KEN BROWER

IBLA 81-609 Decided September 16, 1982

Appeal from a decision of the Montana State Director, Bureau of Land Management, denying the protest of the designation of inventory unit MT-068-244 as a wilderness study area. 8500 (931).

Affirmed in part; set aside and remanded in part.

1. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act -- Words and Phrases

   "Roadless." H.R. Rep. No. 94-1163, 94th Cong., 2d Sess. 17 (1976), provides a definition of "roadless" adopted by the Bureau of Land Management in its Wilderness Inventory Handbook. The word "roadless" refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.

2. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

   Where the record evidences BLM's firsthand knowledge of the lands within an inventory unit and contains comments from the public as to the area's fitness for wilderness preservation, BLM's subjective judgment of the area's naturalness qualities and its subjective determinations as to whether the area possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation are entitled to considerable deference.

3. Federal Land Policy and Management Act of 1976: Wilderness -- Wilderness Act

> Sights and sounds outside a wilderness study area will be considered during the study phase of the wilderness review process absent a finding by BLM during the inventory phase that such impacts are adjacent to the unit and are so extremely imposing that they cannot be ignored, and if not considered, reasonable applciation of inventory guidelines would be questioned.

APPEARANCES: Bradley B. Parrish, Esq., Lewistown, Montana, for appellant; Dale D. Goble, Esq., Office of the Solicitor, Washington, D.C., for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Ken Brower appeals from a decision of the Montana State Director, Bureau of Land Management (BLM), dated March 13, 1981, denying the protest of the designation of inventory unit MT-068-244 as a wilderness study area (WSA). The lands at issue, known as the Dog Creek South WSA, border the Missouri River in Chouteau and Blaine Counties, Montana.

The State Director announced his decision to designate unit MT-068-244 as a WSA in a notice published in the Federal Register on November 14, 1980. 45 FR 75589. This notice stated that 5,230 acres of the unit had been designated a WSA and 6,520 acres had been dropped from further wilderness review. Appellant protested the decision to designate any part of this unit as a WSA, pointing out that a road exists in secs. 26, 27, 28, 29, and 30, T. 23 N., R. 17 E., Principal meridian. Appellant also objected to the location on BLM maps of a road that forms part of the southern boundary of the WSA; repositioning of this road, appellant maintains, would remove approximately 600 acres from the WSA.

Appellant's objection to roads in the WSA is based upon the requirements of section 603(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1782(a) (1976). That section directs the Secretary to review those roadless areas of 5,000 acres or more and roadless islands of the public lands, identified during the inventory required by section 201(a) of the Act as having wilderness characteristics described in the Wilderness Act of September 3, 1964, 16 U.S.C. § 1131 (1976).

The State Director responded to appellant's charge of an inaccurate location of the southern boundary road stating that this road, passing through secs. 4, 5, and 6, T. 22 N., R. 17 E., was properly located on BLM maps. The Director noted that this road bisected the unit and that the acreage north of the road possessed wilderness characteristics. Appellant does not offer further argument in his statement of reason that this road is inaccurately plotted.

Appellant does, however, renew his argument that a road exists in secs. 26, 27, 28, 29, and 30, T. 23 N., R. 17 E. This road, appellant contends, divides the Dog Creek South WSA into two parts, each of which is less than 5,000 acres in size. As this Board has noted in Tri-County Cattlemen's Association, 60 IBLA 305 (1981), an area less than 5,000 acres in size may not be designated a WSA under section 603(a). If appellant's contentions are correct, the State Director's decision to designate the Dog Creek South unit a WSA under section 603(a) must be reversed.

In his protest response of March 13, 1981, the State Director stated that he had viewed the access route at issue and found that it was obvious that the route had received recent substantial construction. The Director noted, however, that he was not convinced that this route has been maintained in the recent past for regular and continuous use. No change in unit boundaries was made by the Director as a result of appellant's protest.

[1] The reference in the State Director's decision to construction and maintenance is taken from H.R. Rep. No. 1163, 94th Cong., 2d Sess. 17 (1976). Therein a definition of the term "roadless," as used in section 603(a), is provided: "The word `roadless' refers to the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road." BLM has adopted this definition in its Wilderness Inventory Handbook (Sept. 27, 1978) at page 5.

Accompanying appellant's protest were a number of statements from persons identified as owners or operators of ranches to the east and west of the WSA. These statements, while alleging mechanical maintenance of the route in the past, do not provide a clear indication of when mechanical maintenance was last performed and by whom. The State Director did not comment on these statements in his protest response.

AS noted above, the State Director did comment that the route at issue has received "recent substantial construction." Though it is difficult to determine from this statement when such construction occurred, it is possible that maintenance of this route has not yet been necessary. In Organic Act Directive (OAD) 78-61, Change 2, BLM addressed this issue at page 4: "(1) Is a route a road if it has been improved to insure relatively regular and continuous use but has not yet required maintenance? Yes. Improvements and relatively regular and continuous use would be an indication that the road would be maintained if the need were to arise." Appellant's affidavit states that this route is used several times per week for fence maintenance and the hauling of feed.

Without further information as to the nature of the recent substantial construction referred to by the State Director and when such construction occurred, it is impossible to determine whether the State Director correctly found this route to be a vehicle way, rather than a road. Accordingly, the State Director's decision is set aside as to this issue and the case file is remanded to the State Office for preparation of a new protest response elaborating on the nature of such recent substantial construction, when it took place, and whether mechanical maintenance has been necessary

since construction. The State Office is urged to respond to the various statements attached to appellant's protest alleging mechanical maintenance of this route. This new protest response shall grant appellant a right of appeal in the event appellant is adversely affected. See Sierra Club, 62 IBLA 367 (1982).

Any appeal taken by appellant must take into careful consideration each element of the "roadless" definition set forth above. Any effort to establish the existence of a road in the WSA should include allegations of who improved the route at issue by mechanical means; who maintains the route by mechanical means; and when such improvement and maintenance last occurred. If maintenance has been unnecessary because of recent improvements or stable soils, evidence to this effect is necessary.

The remainder of appellant's arguments focusing on inventory issues challenge BLM's determinations that the area possesses naturalness and outstanding opportunities for solitude. Appellant points to fences, the remains of old homesteads, dams, and the aforementioned route through secs. 26-30, also known as the Missouri River Road, as evidence that naturalness is lacking in the unit. BLM acknowledged these instrusions in its narrative summary and protest response, but concluded that such imprints were not substantially noticeable.

BLM's use of the "substantially noticeable" standard is derived from section 2(c) of the Wilderness Act, 16 U.S.C. § 1131(c) (1976). Therein, Congress set forth the definition of wilderness:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

[2] This definition is ample support for the proposition that a WSA need not be free of all intrusions. Naturalness is present in a WSA if the area "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." (Emphasis added.) The underscored language, taken verbatim from section 2(c), illustrates the highly subjective judgment which BLM must make in determining whether an area possesses the quality of naturalness. In the present case,

this judgment was entrusted to BLM personnel whose reports evidence firsthand knowledge of the land. Assisting BLM were comments from numerous groups and individuals of wide ranging interests. BLM's judgment in such matters, we feel, is entitled to considerable deference. Such deference will not be overcome by an appellant expressing simple disagreement with a subjective conclusion of BLM. This is not to suggest that we have renounced our review of subjective wilderness judgments. We do mean to suggest, however, that an appellant seeking to substitute its subjective judgments for those of BLM has a particularly heavy burden to overcome the deference we accord to BLM in such matters. Appellant's arguments do not meet this burden. C & K Petroleum Co., 59 IBLA 301 (1981); Richard J. Leaumont, 54 IBLA 242, 245, 88 I.D. 490, 491 (1981).

In support of his argument that the WSA lacks outstanding opportunities for solitude or a primitive and unconfined type of recreation, appellant points to the unit's small size and to the ranches on its borders. 1/ Intensive farming operations are carried out on these lands, appellant maintains, and such operations detract from the solitude or recreation envisioned by the statute.

The question whether a unit possesses outstanding opportunities for solitude or a primitive and unconfined type of recreation again calls for a highly subjective determination by BLM. Sierra Club, supra, and cases cited therein. In order to guide the exercise of this judgment, BLM has issued OAD 78-61, Change 3, July 12, 1979, which addresses the issue of solitude at pages 3-4:

> It is erroneous to assume that simply because a unit or portion of a unit is flat and/or unvegetated, it automatically lacks an outstanding opportunity for solitude. It is also incorrect to automatically conclude that simply because a unit is relatively small, it does not have an outstanding opportunity for solitude. Consideration must be given to the interrelationship between size, screening, configuration, and other factors that influence solitude.

BLM based its conclusion that outstanding opportunities for solitude existed in the WSA upon finding that "[d]eeply eroded drainages, some with pockets of ponderosa pine, offer excellent screening for both offsite and onsite activities" (Narrative summary, Dec. 1980, at 1). BLM's finding of both topographic and vegetative screening adequately supports its conclusion. Appellant's conclusion to the contrary, while not unreasonable, does not undermine the deference we accord to BLM in this area.

[3] Appellant's concern that the ranches and farming operations on the border of the WSA will impair its wilderness suitability is a proper issue during the study phase of the wilderness review program. Ruskin Lines, 61 IBLA 193 (1982). The study phase commences upon conclusion of BLM's inventory duties. BLM's practice, as set forth in OAD 78-61, Change 3, is to assess the imprints of man outside unit boundaries during the inventory stage

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1/ BLM found that the WSA possessed outstanding opportunities for solitude, but lacked outstanding opportunities for a primitive and unconfined type of recreation.

only in situations where the imprint is adjacent to the unit and its impact is so extremely imposing that it cannot be ignored, and if not considered, reasonable application of inventory guidelines would be questioned. Imprints of man outside the unit, such as roads, highways, and agricultural activity, are not necessarily significant enough to cause their consideration in the inventory of a unit. Id. at 4. Appellant's allegation of ranches and farming operations does not demonstrate error in BLM's actions. While appellant's argument may ultimately cause BLM to recommend the WSA as unsuitable for wilderness preservation, it is premature at this time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the State Director is affirmed in part and set aside and remanded in part for action consistent herewith.

Anne Poindexter Lewis
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Douglas E. Henriques
Administrative Judge